In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-819

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

THE UNITED STATES, Respondent.

REPLY BRIEF

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REPLY BRIEF

Petitioner, shocked by respondent's misrepresentations and evasions in its Memorandum In Opposition, submits the following itemized rebuttals. The Solicitor General has the duty to make competent and honest statements of fact and to meet the arguments in the Petition.

1. Respondent states on page 2 of its Memorandum:

> The Court of Claims concluded that petitioner's delay resulted in prejudice, i.e., "loss of evidence by death of witnesses, human forgetfulness, destruction of documents, etc. (Defendant points out that three key witnesses are dead.)" (Pet. App. 6)

Respondent took the court's statement out of context. The Court of Claims stated at that point that those factors are some of the traditional elements of prejudice to a defendant, but it never actually found those elements to be present in this case, nor would it give plaintiff an opportunity to show their complete absence.

No records were lost. The Government filed the complete administrative record, which included the testimony of the dead witnesses and precluded forgetfulness. Nor did

defendant ever allege loss of records or forgetfulness.

Rather the Court of Claims ruled that the prejudice is to be found in the delay of a trial inherently unfair to NASA officials who would have to endure plaintiff's attacks on their integrity and honor after having lived ten years with bated breath. At that point the court ventured that it was "inevitable" that loss of evidence had occurred by the death of witnesses but it made no finding to that effect in this case. Indeed the court failed to mention that two of the witnesses had died in 1972 and that defendant had never alleged they were essential to defendant's case and had admitted in the administrative record that they had nothing to do with FROMMHAGEN'S discharge. (Pet.App.A-8)

The Court of Claims as well as the UNITED STATES, again in its Memorandum In Opposition, persistently have evaded the facts that a trial is unnecessary in this case because the administrative record, filed in its entirety, shows on its face the violations of regulations and of due process which are the only issues raised by FROMMHAGEN in his cross-motion for summary judgment. Those issues do not impugn the honor or integrity of NASA officials.

The Court of Claims, biased in favor of the UNITED STATES and aware that a showing of prejudice is necessary to sustain laches, invented a prejudice, namely, an extensive trial which is neither necessary or desirable and which both defendant and plaintiff waived.

Respondent completely evaded that principal thrust by petitioner.

The vast majority of cases in the Court of Claims have been decided on cross-motions for summary judgment upon a stipulated record of the facts. FROMMHAGEN seeks nothing more.

In SHANTEAU v. UNITED STATES, 208 Ct. Cl. 983 (1975) the Court of Claims quoted the Government as contending that the court's review in this type of case should be confined to the administrative record. Respondent continues to remain silent on the necessity of a trial herein.

FROMMHAGEN was not required to jeopardize his health and well-being by filing a suit which can be decided as well and without any prejudice to defendant in 1977 or 1979 as at any earlier time.

2. Respondent states in its Opposition Memorandum at page 2 that "petitioner cross-moved for summary judgment, alleging that he was mentally and physically incapacitated from filing suit from 1971 until 1977." That statement is both wrong and right and represents a significant admission appearing for the first time.

It is wrong to the extent that all of the allegations in FROMMHAGEN'S cross-motion for summary judgment are directed to procedural errors in the adverse action and the subsequent administrative appeals.

However, it is correct to the considerable extent that his allegations and affidavits, and those of his physicians, attorneys, family, and associates, submitted in opposition to defendant's motion for summary judgment, asserted in great detail that FROMMHAGEN was incapable mentally and financially from bringing suit in the entire period of 1971 through 1977. The Court of Claims never has admitted the existence of those facts as they pertain to the periods of 1971-1972 and 1974-1977. The statement shown above is the first time the Government has ever admitted that the allegations covered the entire period of 1971-1977.

3. Respondent asserts in its Opposition Memorandum that petitioner has not raised any important questions of law. That is untrue; the respondent evaded them. Important questions of law and significant departures from precedents in the other federal courts and from the accepted course of judicial proceedings attend (a) the refusal of the Court of Claims to grant a trial on the allegation of laches when issues of fact exist as to the prejudice that would be incurred by defendant and the reasons for plaintiff's delay, and (b) the granting of summary judgment to the UNITED STATES when that party failed to contest the evidence, in the form of affidavits, filed by FROMMHAGEN that he was unable to file until 1977.

4. Respondent stated that FROMMHAGEN requested both summary judgment and a trial on the issue of laches. That statement is a perversion of the facts. Petitioner repeatedly requested of the Court of Claims that a trial be held on the issue of laches, but only if that court was inclined to grant defendant's motion for summary judgment on that ground.

5. Respondent states in its opposition brief that petitioner claimed prejudice from the refusal of the court to permit depositions. That assertion is true only to the extent that the depositions would bear on the issue of laches. Petitioner waived discovery on the merits of his cross-motion for summary judgment.

6. Respondent states in its Opposition Memorandum that one of the grounds for its motion for summary judgment was that the 9000-page administrative record supported the administrative decisions. That statement is incorrect. The ground other than laches was collateral estoppel which the Court of Claims rejected. That court never decided on the merits, nor did any other court.

7. Respondent states defensively that petitioner was dismissed because his performance was not commensurate with his grade level, but does not tell why the grade level was not reduced as an alternative to the dismissal action.

In his Supplemental Brief, filed herein on January 12, 1979, FROMMHAGEN states that he was discharged for as yet undisclosed reasons. Those reasons were his criticisms of NASA fiscal and management policies in grievance proceedings, in which he partially prevailed, and his revelations to the F.B.I. of a major scandal involving a national poltical figure.

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The actions of the Court of Claims in inventing a prejudice to defendant and disregarding plaintiff's reasons for delay are further justification for the establishment of a National Court of Appeal. The specialized federal courts, such as the Court of Claims, require a direct appellate authority. In the absence of such authority petitioner pleads for a review of this case by this Court.

Dated: January 17, 1979.

Respectfully submitted:

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